

STATE OF MICHIGAN  
COURT OF APPEALS

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JEFFREY M. SZKRYBALO,

Plaintiff-Appellant,

and

KEVIN M. SZKRYBALO, KENNETH A.  
SZKRYBALO, GREGORY A. SZKRYBALO,  
and ESTATE OF HARRY A. SZKRYBALO,

Plaintiffs,

V

JAMES SZKRYBALO and ANDREA  
SZKRYBALO,

Defendants-Appellees.

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UNPUBLISHED

September 21, 2006

No. 269125

Wayne Circuit Court

LC No. 05-504675-CZ

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Plaintiff, Jeffrey M. Szkrybalo, appeals as of right an order granting summary disposition to defendants, James Szkrybalo and Andrea Szkrybalo, in this action alleging a violation of the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.* Because plaintiff did not submit evidence of actual or constructive fraud, we affirm.

This action has its basis in James Szkrybalo's ("James") embezzlement of funds from the estate of Harry Szkrybalo. Due to James' actions, a judgment was entered in favor of plaintiffs against James in the amount of \$268,669.86. Shortly after the judgment was entered, plaintiff discovered that Andrea Szkrybalo purchased a home in her and her daughter's names. In 2004, defendants refinanced the home, executing mortgages for the same while, according to plaintiff, James failed to pay on the judgment as required. Plaintiffs contend James substantially contributed to the upkeep, mortgage payments and maintenance of the home, and that defendants thus acted with intent to hinder, delay, or defraud James Szkrybalo's creditors in purchasing/refinancing the home. Summary disposition was ultimately granted in favor of defendants pursuant to MCR 2.116(C)(10).

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). A motion made

under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

On appeal, Jeffrey Szkrybalo (hereinafter “plaintiff”) argues that the trial court erred in granting summary disposition to defendants and denying summary disposition to plaintiffs because plaintiffs submitted evidence of actual and constructive fraud with respect to the purchase of the home in Andrea Szkrybalo’s name. We disagree.

Fraud must be proved by clear and convincing evidence and must never be presumed. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996). But fraud may be established by circumstantial evidence. *Id.*, p 458. “In other words, fraudulent or wrongful conduct may be inferred from other evidence.” *Id.*

There are two UFTA statutory sections defining the elements of fraudulent transfers, MCL 566.34 (transfer with intent to defraud) and MCL 566.35 (transfer by debtor as fraud). The first is dubbed by plaintiff “actual fraud,” the second “constructive fraud.”

MCL 566.34 provides in pertinent part:

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

MCL 566.34(2) enumerates several factors for determining whether there is actual intent to hinder, delay or defraud:

- (2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:
- (a) The transfer or obligation was to an insider.
  - (b) The debtor retained possession or control of the property transferred after the transfer.
  - (c) The transfer or obligation was disclosed or concealed.
  - (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
  - (e) The transfer was of substantially all of the debtor's assets.
  - (f) The debtor absconded.
  - (g) The debtor removed or concealed assets.
  - (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
  - (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
  - (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
  - (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Actual intent to defraud may be inferred from the “badges of fraud” set forth above. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 659; 513 NW2d 441 (1994). *Id.* “These badges of fraud are not conclusive evidence, but may be strong or weak depending upon their nature and number occurring in the same case.” *Id.* at 659-660.

An initial issue when considering whether actual fraud has been shown is whether there was a transfer by James. Under the UFTA, a “[t]ransfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance.” MCL 566.31(l). From 2002 through 2005, James made numerous deposits of checks, ranging in value from tens of dollars to several thousands of dollars, into bank accounts at Independent Bank and Midwest Guaranty Bank. The Independent Bank account is in Andrea’s name, and the Midwest Guaranty Bank account is in the name of Andrea, or at least has Andrea’s name on the checks and deposit slips. Significantly, mortgage payments for the home were made through checks drawn on these accounts. Because James deposited large sums of money into bank accounts that were in Andrea’s name, and mortgage payments were made using those accounts, we conclude that there were transfers by James to Andrea. In addition, James admitted in answers to interrogatories “THAT A PORTION OF SOME, BUT NOT ALL, OF THE NOTE PAYMENTS . . . WERE SUPPLIED BY ME.” (Emphasis in original.)

There being transfers, the issue becomes whether James made the transfers with actual intent to hinder, delay, or defraud any creditor. Considering the factors set forth in MCL 566.34(2), there is little evidence of such an intent. For example, the transfer was not concealed. Further, James had not been sued or threatened with suit at the time he and Andrea acquired the homestead. There is also no evidence that James contributed substantially all of his assets into the acquisition thereof and no evidence that James absconded, or removed or concealed assets.

Further, under MCL 566.34(1)(b), there is no evidence that James failed to receive reasonably equivalent value for any payments he made toward the acquisition, maintenance and upkeep of the marital home. Assuming James contributed to the funds used to acquire the homestead, James received reasonably equivalent value for that contribution, i.e., the value of the use of the home. Use of a home worth over \$240,000 is a significant value.

True, Andrea and defendants' daughter received title to the marital homestead. Thus, any contribution by James to its acquisition could be viewed as a transfer to insiders under MCL 566.34(2)(a). See MCL 566.31(g)(i)(A). However, the remaining factors listed in MCL 566.34(2) fail to suggest actual intent to hinder, delay or defraud creditors. Accordingly, the trial court correctly concluded that plaintiff failed to satisfy the factors set forth MCL 566.34 concerning a transfer with intent to defraud.

We next consider whether there was sufficient evidence of a constructive fraudulent transfer. MCL 566.35(1) provides, in pertinent part:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Here, under MCL 566.35(1), the first element is satisfied, because plaintiffs' claim arose before the transfer was made (plaintiffs already had a judgment from 1999). The second element, however, is not satisfied. As discussed above, James received value for any contributions he made toward the acquisition of the homestead, because he received the use thereof. The failure of the second element alone supports the trial court's decision.

Moreover, the third element is also not satisfied because plaintiff fails to present evidence of when James became insolvent. In fact, plaintiff presented evidence below that James received numerous payments from various sources and there was no evidence offered as to the value of all James' assets and liabilities so as to enable a determination of insolvency. Accordingly, plaintiff failed to establish all of the elements of a constructive fraudulent transfer under MCL 566.35.

In conclusion, plaintiff failed to sustain his burden of presenting evidence supporting a claim of a transfer with intent to defraud, because (a) an analysis of the badges of fraud does not indicate that James had actual intent to defraud, and (b) evidence does not suggest that James failed to receive value for any transfers. Plaintiff failed to sustain his burden of presenting evidence of a claim of constructive fraudulent transfer, because (a) James received reasonably equivalent value for the mortgage payments in the form of use of the home, and (b) plaintiff failed to establish that James was insolvent at the time the payments were made.

Affirmed.

/s/ Christopher M. Murray  
/s/ Michael R. Smolenski  
/s/ Deborah A. Servitto